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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/511,533	10/15/2004	Paolo Lameri	LAVO-37109	4414
116 7590 09/29/2008 PEARNE & GORDON LLP 1801 EAST 9TH STREET SUITE 1200 CLEVELAND, OH 44114-3108				
EXAMINER				
PURDY, KYLE A				
ART UNIT		PAPER NUMBER		
1611				
MAIL DATE		DELIVERY MODE		
09/29/2008		PAPER		

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

# Office Action Summary

**Application No.**

10/511,533

**Applicant(s)**

LAMERI, PAOLO

**Examiner**

Kyle Purdy

**Art Unit**

1611

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 02 June 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 8-27 is/are pending in the application.
- 4a) Of the above claim(s) 14-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 8-13 and 22-27 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-893)  
Paper No(s)/Mail Date 1 page (10/15/2004)
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Election Acknowledged***

1. Applicant's election with traverse of the invention of Group I encompassing claims 8-13 and 22-27 in the reply filed on 06/02/2008 is acknowledged. However, in Applicants response, Applicant failed to identify problems with the restriction requirement.

2. The requirement is still deemed proper and is therefore made FINAL.

### ***Status of Application***

3. Claims 8-27 are pending, claims 14-21 are withdrawn as being directed to nonelected inventions and claims 8-13 and 22-27 are presented for examination on the merits. The following rejections are made.

### ***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. **Claims 8-10 and 22-24 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070).**

6. Bratescu is directed to emulsions comprising a blend of surfactants, active agents, oil and water. The emulsions may be employed in agricultural and pesticidal applications (see abstract). The emulsions is to comprise from about 3% to about 70% by weight of an oil and from about 15% to about 97% by weight of water (see column 4, lines 50-65 and claim 1; see instant claims

8, 9, 22 and 23). Exemplified oils include vegetable oils such as olive and castor oil (see column 23, lines 60-65; see instant claims 10 and 24). The emulsions composition may comprise a fungicide (see column 29, line 65).

7. Bratescu fails to teach using the emulsion specifically for agricultural cultivation.

8. Regardless, it would have obvious to one of ordinary skill in the art at the time the invention was made to use the teaching of Bratescu with a reasonable expectation for success in arriving at a method of treating fungi on plants by applying a composition comprising a fungicide, between 15% and 85% water and between 85% and 15% oil. Bratescu teaches such a composition and indicates that fungicides are to be included. Although Bratescu does not expressly teach using their composition on plants to prevent fungi growth on crops, Bratescu itself provides such a motivation. Bratescu states that their composition may be employed in agricultural applications, and so to a person of ordinary skill such a recitation would serve as a sufficient motivation to use their composition for the treatment of agriculture. Therefore, a method of treating fungi on agriculture using a composition comprising a fungicide, water and oil is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

**9. Claims 11 and 25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070) in view of Narayanan et al. (US 5176736).**

10. Bratescu is relied upon for disclosure described in the rejection of claims 8, 10, 22 and 24 under 35 U.S.C. 103(a).

11. Bratescu fails to teach soybean oil.

12. Narayanan is directed to delivery systems for agricultural chemicals wherein the delivery systems are emulsifiable concentrates. It is taught that the concentrates include an oily component, and an exemplified oil is soybean oil (see column 9, lines 15-20; see instant claims 11 and 25).

13. Therefore, it would have been obvious to one of ordinary skill at the time the invention was made to combine the teachings of Bratescu with Narayanan with a reasonable expectation for success in making a fungicidal emulsion comprising soybean oil. One would have been motivated to use soybean oil as an oily component of the emulsion because it is taught by Bratescu that vegetable oils are suitable for use in their emulsion. Soybean oil is a vegetable oil. Therefore, implementing soybean oil in a fungicidal emulsion is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

**14. Claims 12, 13, 26 and 27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Bratescu et al. (US 6528070) in view of Huber-Emden et al. (US 3873703).**

15. Bratescu is relied upon for disclosure described in the rejection of claims 8 and 22 under 35 U.S.C. 103(a).

16. Bratescu fails to teach the fungi being inhibited as being *Botritis* spp as well as the agriculture being a tomato or potato crop.

17. Huber cures these deficiencies. Huber is directed to fungicidal compositions and methods of killing fungi with said compositions. The composition may be in the form of an emulsion (see column 3, line 25 and line 60). The composition is taught to be useful for

combating fungi on grain, corn, rice, vegetable and fruit cultures (see column 3, lines 30-35). The composition is disclosed as capable of inhibiting growth of *Botrytis* and *Verticillium* (see column 3, lines 30-50; see instant claims 12 and 26).

18. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to combine the teachings of Bratescu and Huber with a reasonable expectation for success in arriving at a method of preventing and treating the growth of fungi by administering a fungicidal emulsion wherein the fungi is a *Botrytis* and is growing on a fruit or vegetable crop. Huber teaches that fungicidal emulsions can be applied to inhibit the growth of harmful fungi such as *Botrytis* on fruit and vegetable crops. Albeit Huber doesn't specifically teach and species of vegetable of fruit crop, it would have been obvious to any person of ordinary skill in the art to envision using the method of Bratescu on vegetable crops such as tomato and potato as well as on fruit crops such as peach and pear. Such a discovery that a fungicidal emulsion is useful for inhibiting growth of fungi upon such crops is not due to innovation, but rather to common sense and ordinary skill in the art. Therefore, a method of inhibiting *Botrytis* and fungi growth on fruit and vegetable crops is *prima facie* obvious to one of ordinary skill in the art at the time the invention was made, as evidenced by the references, especially in absence of evidence to the contrary.

### ***Conclusion***

19. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Kyle A. Purdy whose telephone number is 571-270-3504. The examiner can normally be reached from 9AM to 5PM.

20. If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Sharmila Landau, can be reached on 571-272-0614. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

21. Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

*/Kyle Purdy/  
Examiner, Art Unit 1611  
September 16, 2008*

*/Sharmila Gollamudi Landau/  
Supervisory Patent Examiner, Art Unit 1611*